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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,	)	
	)	Case No.: 2:14-cr-00085-APG-CWH
Plaintiff,	)	
	)	GOVERNMENT'S RESPONSE TO
vs.	)	DEFENDANT'S MOTION FOR
	)	REQUESTING ISSUANCE OF A
KENNETH GORDON WESCOTT,	)	SUBPOENA PURSUANT TO FRCP 17(b)
	)	(Dkt #203)
Defendant.	)	

COMES NOW the United State of America, by and through DANIEL G. BOGDEN, United States Attorney, and Allison Herr, Special Assistant United States Attorney, and files this Response to the *Defendant's Motion For (Sic) Requesting Issuance of a Subpoena Pursuant to FRCP 17(b)* filed on September 17, 2015 by Defendant KENNETH GORDON WESCOTT (hereinafter "Wescott") acting as his own counsel. (Dkt #203). Defendant Wescott seeks the issuance of a subpoena to Chief Segwick whom he identifies as the Chief of Security for the Nevada Southern Detention Center.

**ARGUMENT**

The defendant has filed a motion seeking issuance of one subpoena on his behalf for taped conversations between the defendant and the office of his stand-by counsel. Clearly, the

1 defendant has a right to subpoena witnesses for trial, which is currently set for September 28,  
2 2015, as Federal Rule of Criminal Procedure 17(b) provides that,

3       Upon a defendant's ex parte application, the court must order that a subpoena be  
4       issued for a named witness if the defendant shows an inability to pay the witness's  
5       fees and the necessity of the witness's presence for an adequate defense. If the  
6       court orders a subpoena to be issued, the process costs and witness fees will be  
7       paid in the same manner as those paid for witnesses the government subpoenas.

8 The Court upon review of the Defendant's exparte petition ordered that the motion would be  
9 made viewable to the Government so they could file responsive pleadings, presumably because  
10 of the failure to show the necessity of the witness.

11       While the Government does not oppose *per se* the issuance of a subpoena, the  
12 Government notes the form of the request is for a "subpoena" rather than a "subpoena duces  
13 tecum", so there may be issues with enforceability, as the substance of the request is for the  
14 production of documents rather than the testimony of a witness. Moreover, the compliance date  
15 is the same date as the trial, thus there may be problems with the admissibility of any documents  
16 received as the late compliance date will deprive both sides of a pre-trial review of the  
17 documents, and further will not allow compliance with this court's trial order. Finally, some  
18 communications may be subject to privilege and the defendant should be aware that by placing  
19 those communications in evidence, he may be waiving that privilege. Consequently while the  
20 Government does not oppose the issuance of trial subpoenas, they do not waive their right to  
21 raise any lawful objections to admission of the evidence at the time of trial.

22       The primary concern here is with the showing of necessity. *Federal Rule of Criminal*  
23 *Procedure 17* allows a defendant to submit an ex parte application requesting the court to order  
24 that a subpoena to be issued for a named witness. *Federal Rule of Criminal Procedure 17(b)*. In  
order to secure the subpoena a defendant must show (1) "an inability to pay the witness's fees"  
and (2) "the necessity of the witness's presence for an adequate defense." *Id.* Additionally,

1 *Federal Rule of Criminal Procedure 17(c)(2)* provide that a court may quash or modify a  
2 subpoena “if compliance would be unreasonable or oppressive.”

3 Rule 17 however does not broaden the limited discovery available in criminal cases;  
4 rather, the purpose of Rule 17 is to avoid unnecessary delay at trial by providing a mechanism  
5 for pre-trial production and inspection of certain material. See *Bowman Dairy Co. v. United*  
6 *States*, 341 U.S. 214, 220 (1951). A defendant may not use a Rule 17 Subpoena to seek material  
7 that they are prohibited from obtaining under Rule 16. See, e.g., *United States v. Cherry*, 876  
8 F.Supp. 547, 552 (S.D.N.Y.1995) (noting that Rule 17 subpoenas cannot be used to “undercut[ ]  
9 the strict limitation of discovery” found in Rule 16).

10 A subpoena duces tecum in a criminal case is not properly used as a discovery tool, but  
11 only to ensure that documents are brought to trial early enough that the opposing party may  
12 review them before they are offered into evidence. *United States v. Nixon*, 418 U.S. 683, 698–99  
13 & n.11 (1974) (citing *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951)).

14 Any application for subpoenas must be made in good faith and not intended as a general  
15 “fishing expedition.” *Nixon*, 418 U.S. at 699-700; accord *Bowman Dairy*, 341 U.S. at 219-22;  
16 see also *United States v. Noriega*, 764 F.Supp. 1480, 1493 (S.D.Fla. 1991) (“If the moving party  
17 cannot reasonably specify the information contained or believed to be contained in the  
18 documents sought but merely hopes that something useful will turn up, this is a sure sign that the  
19 subpoena is being misused”). The use of information for impeachment purposes has generally  
20 been held to be insufficient to justify pretrial production of documents. *Nixon*, 418 U.S. at 701;  
21 *Fields*, 663 F.2d at 881. Essentially, the *Nixon* standard requires a showing of relevance,  
22 admissibility, and specificity. See *Nixon*, 418 U.S. at 701.

1 Defendant Wescott fails to make the required showing of the necessity of this  
2 information, or to show the relevancy, admissibility and specificity of the request. Consequently  
3 the Defendant's motion should be denied.

4 Dated this 20th day of September, 2015.

5 Respectfully Submitted,

6 DANIEL G. BOGDEN  
United States Attorney

7 //s//

8 ALLISON HERR  
Special Assistant United States Attorney  
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